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## BANK KERJASAMA RAKYAT MALAYSIA BHD v. BRAMPTON HOLDINGS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[CIVIL SUIT NO: 22NCC-321-08-2014]
B 29 JANUARY 2015

***CIVIL PROCEDURE:*** *Summary judgment – Application for – Banking – Islamic banking facility – Application for amount owed under Bai' Bithaman Ajil Facility and Bai' Al-Inah facility – Triable issues – Whether arose – Rules of Court 2012,* C *O. 14*

***BANKING:*** *Banks and banking business – Islamic banking – Action to recover monies under Bai' Bithaman Ajil Facility and Bai' Al-Inah facility – Whether facility transactions contravened Islamic and Shariah principles – Whether court* D *required to refer Shariah issues to Shariah Advisory Council on Islamic Finance*

The plaintiff, at the request of the defendant, granted the defendant a Term Financing-I Facility ('Islamic Financing Facility'). Accordingly, a letter of offer was issued by the plaintiff to the defendant which provided for two tranches of Islamic financing *ie,* (i) tranche 1 of RM35 million ('Tranche 1') E based on the Islamic principle of *Bai' Bithaman Ajil* ('BBA') and (ii) tranche 2 of RM10 million ('Tranche 2') based on the Islamic principle of *Bai' Al-Inah* ('BAI'). In respect of Tranche 1, an asset purchase agreement ('APA (BBA)') and an asset sale agreement ('ASA (BBA)') was agreed and entered into by the plaintiff and defendant. The APA (BBA) provided for the defendant to sell a piece of land ('Tranche 1 asset') for RM35 million to the F plaintiff and the ASA (BBA) provided for the plaintiff to sell Tranche 1 asset to the plaintiff for RM41.3 million ('sale price (Tranche 1)') and the defendant shall pay the sale price (Tranche 1) by 24 instalments ('Tranche 1 instalments'). In respect of Tranche 2, an asset purchase agreement ('APA (BAI)') and an asset sale agreement ('ASA (BAI)') was agreed and entered G into by the plaintiff and defendant. The APA (BAI) provided for the defendant to sell shares in a certain company (Tranche 2 asset) for RM10 million to the plaintiff and the ASA (BAI) provided for the plaintiff to sell Tranche 2 asset to the plaintiff for RM11.8 million ('sale price (Tranche 2)') and the defendant shall pay the sale price (Tranche 2) by 24 instalments H ('Tranche 2 instalments'). When the Tranche 1 instalments and Tranche 2 instalments fell due and payable, the defendant failed to make the required payments ('defendant's breach'). Upon the defendant's breach, the plaintiff demanded from the defendant, amongst others, the total outstanding sum of RM44,276,675.35 and compensation amount for late payment (*ta'widh*) I calculated at the rate of 1% per annum on the sum of RM44,276,675.35. The defendant did not reply to the plaintiff's demand, hence, the plaintiff filed the present suit against the defendant and claimed, among others, an outstanding sum of RM44,351,924.49 ('outstanding sum') and compensation on the

outstanding sum at the plaintiff's profit rate prevailing for a twelve-month general investment account until the date of full payment ('compensation sum'). Subsequently, the plaintiff filed an application *vide* encl. 5 for summary judgment to be entered against the defendant pursuant to O. 14 of the Rules of Court 2012 ('ROC'). On the contrary, the defendant resisted the plaintiff's application on the ground that there were issues to be tried. The defendant relied on the phrase "unless the context otherwise requires" in the interpretation provision in both the ASA (BBA) and the ASA (BAI) to contend that the ASA (BBA) and ASA (BAI) provided for an "amendment" of the sale price (Tranche 1) and the sale price (Tranche 2) respectively. According to the defendant, based on the calculations stated in Note (i) in the First Schedule to the ASA (BBA) ('Note (i) in first Schedule'), the computation of the sale price (Tranche 1) could not be RM41.3 million. Also, according to the calculations stated in Note (i) in the Second Schedule to the ASA (BAI) ('Note (i) in second Schedule'), the computation of the sale price (Tranche 2) could not be RM11.8 million. The defendant further resisted the plaintiff's application for summary judgment and contended that there were issues to be tried and determined by the court, *ie*, (i) whether the plaintiff had claimed for extra sums of RM490,000 (for Tranche 1) and RM140,000 (for Tranche 2) ('alleged excess'); and (ii) if so, whether the alleged excess constituted interest (*riba*) which was prohibited in Islam and thus rendered the Islamic Financing Facility unenforceable.

**Held (allowing application in encl. 5 with costs):**

**(1)** In failing to pay the Tranche 1 instalments and Tranche 2 instalments, the defendant had committed an "event of default" ('defendant's default') within the meaning of s. 8.01(a) of the ASA (BBA) and s. 8.01(a) of the ASA (BAI). Thus, the defendant shall be liable to pay the indebtedness. The defendant would also be liable to pay the compensation sum pursuant to s. 3.02(a) and (b) of the ASA (BBA) and s. 3.02(a) and (b) of the ASA (BAI). The plaintiff had exhibited a certificate of the indebtedness pursuant to s. 9.01 of both the ASA (BBA) and the ASA (BAI) which certified that the defendant owed the outstanding sum to the plaintiff ('plaintiff's certificate'). Such a certificate was conclusive evidence of the defendant's indebtedness unless the defendant was able to prove fraud or could show manifest error in respect of the certificate. To fortify the plaintiff's application, the defendant did not deny the plaintiff's demand. Such failure meant that the defendant admitted the defendant's default and the attendant liability. (paras 15, 16 & 17)

**(2)** There was no ambiguity regarding the sale price (Tranche 1) and the sale price (Tranche 2). Applying the commercially sensible interpretation of the ASA (BBA) and the ASA (BAI) without regard to technical

A interpretations and undue emphasis on niceties of language, there was no different meanings of the sale price in the same contract. Note (i) in first Schedule and Note (i) in second Schedule merely explained the manner of instalment payments of the sale price (Tranche 1) and the sale price (Tranche 2). There was nothing in Note (i) in first Schedule and Note B (i) in second Schedule which expressly or by necessary implication, varied the definition of the sale price (Tranche 1) and the sale price (Tranche 2) in the interpretation provision. (paras 20)

**(3)** The definitions of the sale price (Tranche 1) and the sale price (Tranche 2) were clear in the interpretation provisions. There was therefore no C issue, let alone a triable one, of the plaintiff breaching the ASA (BBA) and the ASA (BAI) regarding the computation of the sale price (Tranche 1) and the sale price (Tranche 2). Even if the plaintiff had breached the ASA (BBA) and the ASA (BAI) regarding the computation of the sale price (Tranche 1) and the sale price (Tranche 2), the defendant's liability D under the ASA (BBA) and ASA (BAI) still remained and could only be discharged by full payment of the outstanding sum and the compensation sum according to s. 9.02. The defendant had expressly agreed under s. 9.02 of the ASA (BBA) and the ASA (BAI) that the indebtedness could only be discharged by the defendant's full payment of the indebtedness. If the defendant did not pay the indebtedness in full, the defendant E remained liable to the plaintiff under the Islamic Financing Facility. (paras 21, 22 & 16)

**(4)** In view of the interpretation of the sale price (Tranche 1) and the sale price (Tranche 2), there was no alleged excess. Accordingly, the plaintiff F had not made any wrongful claim for the alleged excess. More importantly, the defendant failed to show any error in respect of the outstanding sum certified in the plaintiff's certificate, let alone a manifest error. If the defendant was genuinely concerned about the alleged excess, the defendant should have replied to the plaintiff's demand and alluded to the alleged excess. In addition, the defendant did G not counterclaim that the plaintiff had breached the ASA (BBA) and the ASA (BAI) by claiming for the alleged excess. All these circumstances clearly showed that the defendant's contention concerning the alleged excess, was an afterthought. (paras 24 & 25)

H **(5)** There was no alleged excess to support the defendant's contention that the Islamic Financing Facility was tainted by the interest element which in turn rendered the Islamic Financing Facility unenforceable. Based on the case of *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other appeals* [2009] 6 CLJ 22 as well as s. 51(1) of the Central Bank of Malaysia Act 2009 ('CBMA') and the Islamic Financial Services Act I 2013 ('IFSA'), a court could not simply decide that an Islamic financing

facility was not Shariah compliant. The court should be guided by the advice and ruling of the Shariah Advisory Council on Islamic Finance ('SAC'). Accordingly, the defendant could not merely allege that the Islamic Financing Facility was illegal and unenforceable. The defendant should have obtained advice or ruling from the SAC as to whether the Islamic Financing Facility herein had complied with Shariah or otherwise. (paras 26, 29 & 30)

**Case(s) referred to:**

*Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals [2009] 6 CLJ 22 CA* ***(refd)***

*Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd [2003] 1 CLJ 625 CA* ***(refd)***

*Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC* ***(refd)***

*Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC* ***(refd)***

*Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC* ***(refd)***

*Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd [1998] 3 CLJ 605 CA* ***(refd)***

*David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA* ***(refd)***

*JEC Designabuild Sdn Bhd v. Bunga Kembang Sdn Bhd [2007] 1 AMR 578* ***(refd)***

*Jetara Sdn Bhd v. Maju Holdings Sdn Bhd [2007] 3 CLJ 41 CA* ***(refd)***

*National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC* ***(refd)***

*Noh Hyoung Seok v. Perwira Affin Bank Bhd [2004] 2 CLJ 64 CA* ***(dist)***

*United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 FC* ***(refd)***

**Legislation referred to:**

Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978, s. 14(1)(a)

Central Bank of Malaysia Act 2009, s. 51(1)

Islamic Financial Services Act 2013, ss. 28(1), (2), (5), 29(1)(a), (b), (6), 30(1)

Rules of Court 2012, O. 14 rr. 1(1), 2(1), 3(1), 4(1)

*For the plaintiff - Aziz Mohamed (Mohd Zaid Daud with him); M/s Zulpadli & Edham*
*For the defendant - PK Chong; M/s Ong, Chong & Tan*

*Reported by Sandra Gabriel*

## JUDGMENT

### Wong Kian Kheong JC:

### Introduction

**[1]** The plaintiff company (plaintiff) is a co-operative society registered under the Co-operative Societies Act 1993 and has powers, among others, to grant loans to any person under s. 14(1)(a) of the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978.

**[2]** The defendant company (defendant) has applied to the plaintiff and the plaintiff has agreed to grant a "Term Financing-I Facility" (Islamic Financing Facility).

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## Agreements

**[3]** The following agreements in respect of the Islamic Financing Facility, among others, have been agreed by the plaintiff and defendant:

(a) The plaintiff's letter of offer dated 10 December 2008 which has been accepted by the defendant on 23 January 2009 (first LO). The first LO provides for two tranches of Islamic financing as follows:

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(i) Tranche 1 of RM35 million (Tranche 1) to finance the payment of land cost for a development project (project) based on the Islamic principle of *Bai' Bithaman Ajil* (BBA); and

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(ii) Tranche 2 of RM10 million (Tranche 2) to finance the working capital of the project based on the Islamic principle of *Bai' Al-Inah* (BAI);

(b) The plaintiff's letter of offer dated 21 January 2010 which has been accepted by the defendant;

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(c) The plaintiff's letter of offer dated 23 July 2010 to the defendant which has been accepted by way of the defendant's letter dated 5 August 2010;

(d) The "Asset Purchase Agreement" dated 15 December 2010 signed by both the plaintiff and defendant in respect of Tranche 1 (APA (BBA)). The APA (BBA) provides for the defendant to sell a piece of land (Tranche 1 Asset) for RM35 million to the plaintiff;

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(e) The "Asset Sale Agreement" dated 15 December 2010 signed by both the plaintiff and defendant in respect of Tranche 1 (ASA (BBA)). The ASA (BBA) provides for the plaintiff to sell Tranche 1 Asset to the plaintiff for RM41.3 million (Sale Price (Tranche 1)) and the defendant shall pay the Sale Price (Tranche 1) by 24 instalments (Tranche 1 Instalments);

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(f) The "Asset Purchase Agreement" dated 15 December 2010 signed by both the plaintiff and defendant in respect of Tranche 2 (APA (BAI)). The APA (BAI) provides for the defendant to sell shares in a certain company (Tranche 2 Asset) for RM10 million to the plaintiff; and

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(g) The "Asset Sale Agreement" dated 15 December 2010 signed by both the plaintiff and defendant in respect of Tranche 2 (ASA (BAI)). The ASA (BAI) provides for the plaintiff to sell Tranche 2 Asset to the plaintiff for RM11.8 million (Sale Price (Tranche 2)) and the defendant shall pay the sale price (Tranche 2) by 24 instalments (Tranche 2 Instalments).

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**Background**

**[4]** The defendant failed to pay Tranche 1 Instalments and Tranche 2 Instalments when such instalments fell due and payable (defendant's breach). Upon the defendant's breach, the plaintiff's solicitors sent a demand dated 24 June 2014 to the defendant (plaintiff's demand) stating, among others:

(a) Due to the defendant's breach, the plaintiff demands the defendant to pay the total outstanding sum of RM44,276,675.35 as at 31 May 2014 and compensation amount for late payment (*ta'widh*) calculated at the rate of 1% per annum on the sum of RM44,276,675.35; and

(b) If the defendant fails to pay the above outstanding sum, compensation sum and legal costs within 30 days from the date of the plaintiff's demand:

(i) The Islamic Financing Facility would be terminated and recalled;

(ii) The defendant shall be immediately liable to pay the total outstanding sum together with the compensation sum at the plaintiff's profit rate for a twelve-month "*Qiradh* Investment Account"; and

(iii) The plaintiff shall proceed with legal action against the defendant.

**[5]** The defendant did not reply to the plaintiff's demand. Hence, the plaintiff filed a suit against the defendant (this suit) and claim for, among others, the following relief:

(a) As of 31 July 2014, the defendant shall pay the plaintiff an outstanding sum of RM44,351,924.49 (outstanding sum);

(b) Compensation on the outstanding sum at the plaintiff's profit rate prevailing for a twelve-month general investment account from 1 August 2014 until the date of full payment (compensation sum); and

(c) Costs.

**This Application**

**[6]** The plaintiff filed this application in court enclosure no. 5 (this application) for summary judgment against the defendant under O. 14 of the Rules of Court 2012 (RC).

**Defendant's Submission**

**[7]** The defendant resists this application on the ground that there are four issues to be tried in this suit, namely:

(a) Whether the Sale Price (Tranche 1) is correct and complies with ASA (BBA);

(b) Whether the Sale Price (Tranche 2) is correct and complies with ASA (BAI); and

(c) Whether the plaintiff has claimed for "extra" sums of RM490,000 (for Tranche 1) and RM140,000 (for Tranche 2) (alleged excess); and

(d) If the plaintiff has claimed for the alleged excess, whether the alleged excess constitutes interest (*riba*) which is prohibited in Islam and whether this taints the Islamic Financing Facility in this case and renders the Islamic Financing Facility unenforceable.

**[8]** The defendant also relies on, among others, the Court of Appeal's judgment in *Noh Hyoung Seok v. Perwira Affin Bank Bhd* [2004] 2 CLJ 64 to oppose this application.

**Court's Duties In Deciding A Summary Judgment Application**

**[9]** It is not disputed by the defendant that the following three matters required by O. 14 rr. 1(1) and 2(1) of the RC (three conditions for summary judgment) have been satisfied:

(a) The statement of claim in this case (SOC) has been served on the defendant;

(b) The defendant has entered appearance; and

(c) The plaintiff's deponent has affirmed an affidavit verifying the facts on which the SOC is based and the belief of the plaintiff's deponent that there is no defence to the SOC.

**[10]** The three conditions for summary judgment has been decided by our Federal Court in the following cases:

(a) *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544, at pp. 551-552; and

(b) *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283, at p. 285.

**[11]** As decided in *Cempaka Finance Bhd* and *National Company for Foreign Trade*, once the three conditions for summary judgment have been satisfied by the plaintiff, the burden then shifts to the defendant to resist this application by satisfying the court under O. 14 rr. 3(1) and 4(1) of the RC that there is "an issue or question in dispute which ought to be tried".

**[12]** Even if the defendant cannot raise any triable issue, this application may still be dismissed under O. 14 r. 3(1) of the RC if "there ought for some other reason to be a trial", namely there are circumstances that ought to be investigated by the court – please see the Federal Court's judgment in *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151 at pp. 162-165; [1999] 1 MLJ 657, at pp. 666-668.

**[13]** Based on the above authorities, I will consider whether the defendant has raised any issue to be tried in this suit and assuming the defendant is unable to raise any triable issue, is there "some other reason for trial"?

**Grounds To Support This Application**

**[14]** Despite the defendant bearing the burden to resist this application by raising a triable issue as required by *Cempaka Finance Bhd* and *National Company for Foreign Trade*, I start by ascertaining whether the plaintiff has a valid and strong claim against the defendant in the sense that no issue needs to be tried in this suit.

**[15]** In this case, upon the defendant's failure to pay the Tranche 1 Instalments and Tranche 2 Instalments when such instalments are payable on their due dates, the defendant has committed an "event of default" (defendant's default) within the meaning of the following provisions of the contracts between the plaintiff and defendant:

(a) Section 8.01(a) ASA (BBA); and

(b) Section 8.01(a) ASA (BAI).

**[16]** Upon the occurrence of the defendant's default:

(a) Section 8.01 ASA (BBA) and s. 8.01(a) ASA (BAI) provide that the defendant shall be liable to pay the "Indebtedness" (Indebtedness);

(b) Indebtedness is defined in:

(i) Section 1.2 ASA (BBA) as the Sale Price (Tranche 1) and "any other monies howsoever due and payable" to the plaintiff and "include any obligation for the payment or repayment of any other debts or liabilities"; and

(ii) Section 1.01 ASA (BAI) as the Sale Price (Tranche 2) and "any other monies howsoever due and payable" to the plaintiff and "include any obligation for the payment or repayment of any other debts or liabilities";

(c) In addition to the Indebtedness, the defendant shall also be liable to pay the compensation sum as provided in:

(i) Section 3.02(a) and (b) ASA (BBA); and

(ii) Section 3.02(a) and (b) ASA (BAI);

(d) Section 9.01 of both ASA (BBA) and ASA (BAI) (s. 9.01) provides that a statement by the plaintiff's duly authorised officer regarding the amount payable by the defendant "shall in the absence of manifest error be conclusive evidence" that such an amount is "in fact due and payable" by the defendant to the plaintiff "for all purposes including for the purposes of legal proceedings".

In this case, the plaintiff exhibited a certificate of the Indebtedness from the plaintiff's Assistant Vice-President which certified that the defendant owed the outstanding sum to the plaintiff as of 31 July 2014 (plaintiff's certificate).

A The following two Federal Court cases have held that based on a contractual clause providing for conclusiveness of a lender's certificate of the borrower's indebtedness, such a certificate is conclusive evidence of the borrower's indebtedness unless the borrower is able to prove fraud or can show manifest error in respect of the certificate:

B (i) *Cempaka Finance Bhd*, at pp. 691-692; and

(ii) *Citibank NA v. Ooi Boon Leong & Ors* [1980] 1 LNS 168; [1981] 1 MLJ 282, at p. 284.

In this case, the defendant did not allege fraud on the plaintiff's part. For C reasons explained later in this judgment, I find that the defendant has failed to raise any manifest error in respect of the plaintiff's certificate; and

(e) Section 9.02 of both ASA (BBA) and ASA (BAI) (s. 9.02) states that "on the satisfaction by payment or otherwise of the whole of the D Indebtedness due", all the provisions in the ASA (BBA) and ASA (BAI) "shall cease to be of any effect". The defendant has expressly agreed under s. 9.02 that the Indebtedness can only be discharged by the defendant's full payment of the Indebtedness. In other words, if the defendant does not pay the Indebtedness in full, the defendant remains E liable to the plaintiff under the Islamic Financing Facility. Section 9.02 is sufficient in itself for me to allow this application.

**[17]** To fortify this application, the defendant did not deny the plaintiff's demand. The defendant's failure to deny the plaintiff's demand means that the defendant admits the defendant's default and the attendant liability. I rely F on the following cases:

(a) In *David Wong Hon Leong v. Noorazman Adnan* [1995] 4 CLJ 155, at p. 159, the Court of Appeal decided as follows:

> During argument, we registered our surprise at the learned Judge's G reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.
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> H In this context, we recall to mind the following passage in the judgment of Edgar Joseph Jr. J in *Tan Cheng Hock v. Chan Thean Soo* [1987] 2 MLJ 479-487:
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> > In *Wiedemann v. Walpole* [1891] 2 Q.B. 534, 537 an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by I the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise. Lord Esher MR, in his judgment, remarked,

> Here, we have only to see whether the mere fact of not answering the letters, with nothing else for us to consider is any evidence in corroboration of the promise.' (Emphasis added). Earlier, in his judgment, he said, *'Now there are cases - business and mercantile cases in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.* (emphasis added.)

(b) *David Wong Hon Leong* has been affirmed by the Court of Appeal in *Jetara Sdn Bhd v. Maju Holdings Sdn Bhd* [2007] 3 CLJ 41, at p. 55; and

(c) In *JEC Designabuild Sdn Bhd v. Bunga Kembang Sdn Bhd* [2007] 1 AMR 578, at pp. 586-587, the High Court held that a defendant's failure to reply to the plaintiff's demand for payment of a debt, would support a summary judgment application against that defendant in respect of the debt.

**No Triable Issue Regarding Computation Of Sale Price (Tranche 1) And Sale Price (Tranche 2)**

**[18]** Section 1.2 of ASA (BBA) (Interpretation Provision) has defined the Sale Price (Tranche 1) as RM41.3 million while s. 1.01 of ASA (BAI) has defined the Sale Price (Tranche 2) as RM11.8 million.

**[19]** The Interpretation Provision in both ASA (BBA) and ASA (BAI) provides that "unless the context otherwise requires", the definitions in the Interpretation Provision shall apply. The defendant's learned counsel relied on this phrase "unless the context otherwise requires" to contend that the ASA (BBA) and ASA (BAI) have provided for an "amendment" of the Sale Price (Tranche 1) and the Sale Price (Tranche 2) respectively. According to the defendant:

(a) Based on the "Internal Rate of Return (IRR) of 2.00% per annum + BFR (Base Financing Rate) per annum" stated in Note (i) in the First Schedule to the ASA (BBA) (Note (i) in first Schedule), the computation of the Sale Price (Tranche 1) cannot be RM41.3 million; and

(b) According to the "[IRR] of 2.00% per annum + BFR per annum" stated in Note (i) in the Second Schedule to the ASA (BAI) [Note (i) in second Schedule], the computation of the Sale Price (Tranche 2) cannot be RM11.8 million.

**[20]** I am satisfied that there is no ambiguity regarding the Sale Price (Tranche 1) and the Sale Price (Tranche 2). I decide as such for the following reasons:

(a) A commercial contract of such a magnitude as in this case, should be construed in a commercially sensible manner as explained by Gopal Sri

Ram FCJ in the Federal Court case of *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597, at p. 280 (CLJ); pp. 606-607 (MLJ), as follows:

> The agreement in the present case is one that is not regulated by statute. In short, it is not a contract governed by the housing development legislation. The appellant and respondent were therefore at complete liberty, in accordance with the doctrine of freedom of contract to agree on any terms they thought fit. The role of the court is to interpret the contract in a sensible fashion. See *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1. As Lord Steyn said in *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] AC 749 at p 771:
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> > In determining the meaning of the language of a commercial contract, and unilateral contractual notices, *the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.* In contradistinction to this modern approach, Lord Greene MR's judgment in *Hankey v. Clavering* [1942] 2 KB 326 is rigid and formalistic.

(emphasis added).

Applying a commercially sensible interpretation of ASA (BBA) and ASA (BAI) without regard to technical interpretations and undue emphasis on niceties of language, I cannot accept that there are different meanings of the sale price in the same contract. This is clearly not manifestly intended by both the plaintiff and the defendant in ASA (BBA) and ASA (BAI);

(b) The defendant relies on Note (i) in first Schedule and Note (i) in second Schedule to justify a meaning of the Sale Price (Tranche 1) and the Sale Price (Tranche 2) which are different from their definition in the Interpretation Provision of the respective contract. I am of the view that Note (i) in first Schedule and Note (i) in second Schedule merely explain the manner of instalment payments of the Sale Price (Tranche 1) and the Sale Price (Tranche 2) respectively. There is nothing in Note (i) in first Schedule and Note (i) in second Schedule which expressly or by necessary implication, vary the definition of the Sale Price (Tranche 1) and the Sale Price (Tranche 2) in the Interpretation Provision;

(c) I am not able to find any previously decided case wherein parties have agreed to vary a definition in the interpretation clause in the main body of a contract by way of a note in a schedule to the contract. This is not

surprising as parties manifestly intend to provide the salient terms and conditions in the main body of the contract with incidental terms and details to be placed in the schedule to the contract; and

(d) If the defendant's above contention is accepted, this will create uncertainty and may result in an absurdity where an essential term of a sale contract, namely the price, may have different meanings according to the context of the particular provision in the contract!

**[21]** As I have decided above that the definitions of the Sale Price (Tranche 1) and the Sale Price (Tranche 2) are clear in the Interpretation Provision, there is therefore no issue, let alone a triable one, of the plaintiff breaching the ASA (BBA) and ASA (BAI) regarding the computation of the Sale Price (Tranche 1) and the Sale Price (Tranche 2).

**[22]** Even if this court assumes that the plaintiff has breached the ASA (BBA) and ASA (BAI) regarding the computation of the Sale Price (Tranche 1) and the Sale Price (Tranche 2), the defendant's liability under the ASA (BBA) and ASA (BAI) still remains and can only be discharged by full payment of the outstanding sum and the compensation sum according to s. 9.02.

**[23]** I find that the defendant's contention regarding the plaintiff's wrong computation of the Sale Price (Tranche 1) and the Sale Price (Tranche 2) is an afterthought because if the defendant is genuinely troubled by such wrongful computations, the defendant should have replied as such to the plaintiff's demand. It is also to be noted that the defendant has not counterclaimed in this suit that the plaintiff has breached the ASA (BBA) and ASA (BAI), in particular Note (i) in first Schedule and Note (i) in second Schedule.

**No Triable Issue Regarding Alleged Excess**

**[24]** In view of my above interpretation of the Sale Price (Tranche 1) and the Sale Price (Tranche 2), there is no alleged excess. Accordingly, the plaintiff has not made any wrongful claim for the alleged excess. More importantly, the defendant has failed to show any error in respect of the outstanding sum certified in the plaintiff's certificate, let alone a manifest error.

**[25]** If the defendant is genuinely concerned about the alleged excess, the defendant should have replied to the plaintiff's demand and allude to the alleged excess. The defendant should have demanded the plaintiff to withdraw the claim for the alleged excess. The defendant did not counterclaim that the plaintiff had breached the ASA (BBA) and ASA (BAI) by claiming for the alleged excess. All these circumstances clearly show that the defendant's contention concerning the alleged excess, is an afterthought.

A **No Illegality In This Case**

**[26]** For reasons expressed above, there is no alleged excess in this case to support the defendant's contention that the Islamic Financing Facility is tainted by the interest element which in turn renders the Islamic Financing Facility unenforceable.

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**[27]** I remind myself that the following Court of Appeal cases have upheld the validity of a BBA facility and I am bound by the doctrine of *stare decisis* to give full effect to a BBA facility:

(a) In *Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd* [1998] 3 CLJ
C 605, at pp. 609, 611, 616 and 618, Abdul Malek Ahmad JCA (as His Lordship then was) held as follows:

> Under the Property Purchase Agreement, the respondent had purchased the properties for RM520,000 but after having so purchased, under the Property Sale Agreement they were resold to
D the appellant for RM629,000 resulting in a profit of RM109,200. These two agreements were entered into on 6 May 1984. Two days later, the appellant's attorney executed the charges on the properties in favour of the respondent as security for the loan of RM629,200 purportedly granted under the Islamic Banking Concept of *Al Bai' Bithaman Ajil* (hereinafter "ABBA').
>
E In support of the motion, the appellant raised two issues. *The first was that the respondent was at all material times prohibited from accepting charges in respect of usury transactions. …*
>
> *It is also common ground that the respondent is a bank licensed under the Islamic Banking Act 1983 to carry on Islamic banking business which is*
F *to provide financing facilities under the concept of ABBA. As a prerequisite, this concept involves the purchase of the properties by the respondent from the appellant and the immediate resale of the same to the appellant. The issue that requires to be answered, guided by both the Enactment and the Code, is the effect of such sale in the eyes of the law. …*
>
G [the High Court judge decided as follows]:
>
> *In all these cases, the court was asked to give effect to what have been allegedly agreed to by the parties which would consequently involve the transfer of proprietorship. Unlike in the instant case it was never the intention of the parties, in as much as it can ever be said to be*
H *within their contemplation, to involve any transfer of proprietorship. It so happened that the execution of the Property Purchase Agreement and the Property Sale Agreement constituted part of the process required by the Islamic banking procedure before a party can avail itself of the financial facilities provided by the defendant. Hence that would account for the contemporaneous execution of the two*
I *agreements; and in fact, it would be observed that the Property Purchase Agreement would be rendered otiose and bereft of any consequential value the moment the Property Sale Agreement was signed. For my part, I would say that that was what both parties*

> *had bargained for and they too had agreed that beyond this, to proceed no more. These prerequisites had been well understood by the plaintiff.* …
>
> At the end of it all, we saw no reason to disagree with the findings of the learned trial judge and had unanimously dismissed the appeal with costs with the deposit to go to the respondent to account of its taxed costs. (emphasis added)

(b) Abdul Hamid Mohamad JCA (as His Lordship then was) explained as follows in *Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625, at pp. 629 and 633:

> As was mentioned at the beginning of this judgment the facility is an Islamic banking facility. But that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under conventional banking. …
>
> We also note that that the validity of the charge is not in issue.; and

(c) In *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor and Other Appeals* [2009] 6 CLJ 22, at pp. 35, 36 and 39-40, Raus Sharif JCA (as His Lordship then was) decided as follows:

> [24] We have no hesitation in accepting that *riba'* or interest is prohibited in Islam. But the issue at hand is whether such comparison between a BBA contract and conventional loan agreement was appropriate. With respect, we do not think so. This is because the two instruments of financing are not alike and have different characteristics. BBA contract is a sale agreement whereas a conventional loan agreement is a money lending transaction. The profit in BBA contract is different from interest arising in a conventional loan transaction. The two transactions are diversely different and indeed diametrically opposed.
>
> [25] Thus, *the learned judge was plainly wrong when he equated the profit earned by BIMB as being similar to riba' or interest.* The two cannot be similar as BBA contract is in fact a trade transaction. It is a transaction between the customer and the bank. In such transaction, there is a purchase agreement and a separate sale agreement between the customer and the bank. …
>
> Similarly, the law applicable to BBA contracts is no different from the law applicable to loan given under the conventional banking. The law is the law of contract and the same principle should be applied in deciding these cases. Thus, if the contract is not vitiated by any vitiating factor recognised in law such as fraud, coercion, undue influence, etc. the court has a duty to defend, protect and uphold the sanctity of the contract entered into between the parties. …

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> [36] In *any event, the questions raised by the learned judge on the validity and enforceability of the BBA contracts, is not novel. It had been raised in previous cases and had been ruled upon.* In *Adnan bin Omar v. Bank Islam Malaysia Berhad* (unreported), *the Supreme Court upheld the validity and enforceability of the BBA contract.* In that case, the Supreme Court accepted as correct and affirmed the judgment of Ranita Hussein JC. Subsequently, the validity and the enforceability of BBA contracts was again decided by this court in *Datuk Hj. Nik Mahmud Nik Daud v. Bank Islam Malaysia Bhd* [1998] 3 CLJ 605, and *Bank Kerjasama Rakyat Malaysia Berhad v. Emcee Corporation Sdn Bhd (supra).* …
>
> *From the above cases, it is clear that the validity and enforceability of the BBA contract had been ruled upon by the superior courts. It is trite law that based on the doctrine of stare decisis, a decision of a superior court is binding on all courts below it. The importance of this principle must not be taken lightly.*

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C

D (emphasis added).

**[28]** In *Lim Kok Hoe*, at pp. 37-39, the Court of Appeal further held as follows:

> [32] In this respect, *it is our view that judges in civil court should not take upon themselves to declare whether a matter is in accordance to the Religion of Islam or otherwise. As rightly pointed out by Suriyadi J (as he then was) in Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd [2006] 8 CLJ 9 that in the civil court 'not every presiding judge is a Muslim, and even if so, may not be sufficiently equipped to deal with matters, which ulamak take years to comprehend'. Thus, whether the bank business is in accordance with the Religion of Islam, it needs consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.*

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> [33] *This issue is in fact addressed in the Islamic Banking Act 1983.* To ensure that the operation of the banking business of an Islamic bank is in accordance to the Religion of Islam, s. 3(5) provides that the Central Bank ie, the Bank Negara Malaysia shall not to recommend the grant of an Islamic banking licence, and the Minister shall not to grant a licence, unless he is satisfied:
>
> > (b) that there is, in the articles of association of the bank concerned, provision for the establishment of a Syariah advisory body to advise the bank on the operations of its banking business in order to ensure that they do not involve any element which is not approved by the Religion of Islam.

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> [34] *Thus, it is a requirement for any Islamic bank to establish a Syariah advisory body to advise the bank and to ensure the operations of its banking business do not involve any element which is not approved by the Religion of Islam. In fact, in 2003, a single Syariah Advisory Council was established through an amendment of the Central Banking of Malaysia Act 1958. Section 16B of the Central Bank of Malaysia Act 1958 established the central Syariah Advisory Council under the aegis of Bank Negara Malaysia. With the amendment, the single Syariah Advisory Council became "the authority for the ascertainment of Islamic law for the purpose*

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*of Islamic banking business, takaful business, Islamic financing business, Islamic development financial business or any other business which is based on Syariah principles"*. Section 16B(2) of the Act provides for the membership of the Syariah Advisory Council. With the establishment of the single Syariah Advisory Council, the Islamic Banking Act 1983, had been amended accordingly. It provides as follows:

Advice of Syariah Advisory Council

13A(1) An Islamic bank may seek the advice of the Syariah Advisory Council on Syariah matters relating to its banking business and the Islamic bank shall comply with the advice of the Syariah Advisory Council.

(2) In this section, "Syariah Advisory Council" means the Syariah Advisory Council established under sub-section 16B(1) of the Central Bank of Malaysia Act 1958.

[35] Thus, we already have the legal infrastructure to ensure that the Islamic banking undertaken by the banks in this country does not involve any element which is not approved by the Religion of Islam. The court, will have to assume that the Syariah advisory body of the individual bank and now the Syariah Advisory Council under the aegis of Bank Negara Malaysia, would have discharge their statutory duty to ensure that the operation of the Islamic banks are within the ambit of the Religion of Islam. This is more so, when the customers in these appeals have not made any allegations that the Syariah advisory body of BIMB or the Syariah Advisory Council established by the Bank Negara had failed to exercise their statutory duties. Thus, the learned judge, with respect, should not have taken upon himself to rule that the BBA contracts were contrary to the Religion of Islam without having any regard to the resolutions of the Syariah Advisory Council of the Central Bank Malaysia and the Syariah Advisory body of BIMB on the validity of BBA contracts.

(emphasis added).

**[29]** It is to be noted that after the Court of Appeal's judgment in *Lim Kok Hoe*:

(a) Section 51(1) of the Central Bank of Malaysia Act 2009 (CBMA) provides for the Shariah Advisory Council on Islamic Finance (SAC) to be set up by Bank Negara Malaysia (BNM) and SAC "shall be the authority for the ascertainment of Islamic law for the purposes of Islamic financial business"; and

(b) The following provisions in Islamic Financial Services Act 2013 (IFSA) are relevant:

(i) Under s. 28(1) of the IFSA, a financial institution "shall at all times ensure that its aims and operations, business, affairs and activities are in compliance with Shariah". According to s. 28(2) of the IFSA, compliance with any ruling of SAC "in respect of any particular aim and operation, business, affair or activity shall be deemed to be a

compliance with Shariah in respect of that aims and operations, business, affair or activity". Any person who breaches s. 28(1) of the IFSA commits an offence under s. 28(5) of the IFSA which is punishable up to eight years imprisonment and a fine not exceeding RM25 million or both;

(ii) Under s. 29(1)(a) of the IFSA, BNM may in accordance with SAC's advice or ruling, specify standards on Shariah matters in respect of the carrying on of business, affair or activity by a financial institution which requires the ascertainment of Islamic law by the SAC. In accordance with s. 29(1)(b) of the IFSA, BNM may give effect to the advice or ruling of the SAC. Any person who fails to comply with any standards specified under s. 29(1), commits an offence under s. 29(6) of the IFSA and shall, on conviction, be liable to imprisonment for a term not exceeding eight years or to a fine not exceeding RM25 million or both; and

(iii) A financial institution shall establish a Shariah committee under s. 30(1) of the IFSA to advise the financial institution so as to ensure that the financial institution's business, affairs and activities comply with Shariah.

**[30]** Based on *Lim Kok Hoe* as well as the above provisions in CBMA and IFSA, a court cannot simply decide that an Islamic financing facility is not Shariah compliant. The court should be guided by the advice and ruling of the SAC. Accordingly, the defendant cannot merely allege that the Islamic Financing Facility is illegal and unenforceable in this case. The defendant should have obtained advice or ruling from the SAC as to whether the Islamic Financing Facility in this case has complied with Shariah or otherwise.

***Noh Hyoung Seok* Is Distinguishable From This Case**

**[31]** I am of the considered view that *Noh Hyoung Seok* does not assist the defendant in this case. In *Noh Hyoung Seok*, at pp. 69-70:

(a) The plaintiff bank sued, among others, the appellant/fourth defendant (D4) in respect of a guarantee executed by D4 in favour of the plaintiff bank;

(b) D4 sent a letter to the plaintiff bank stating that two officers of the plaintiff bank had verbally confirmed that D4 had been released as a guarantor (D4's Letter). D4 named the two officers of the plaintiff bank in D4's Letter as Ms. Lim and Encik Zulkifli;

(c) The plaintiff bank did not reply to D4's letter. Nor was there any explanation by the plaintiff bank for such a failure to reply to D4's Letter;

(d) Encik Mahmud bin Bidin, the deponent of the plaintiff bank's affidavit (plaintiff bank's affidavit) in support of the plaintiff bank's summary judgment application against D4, affirmed that neither he nor Mr. Tan Kwee Hee (another officer of the plaintiff bank), had released D4 as a guarantor for the plaintiff bank. No reference was made by the plaintiff bank's affidavit to Ms. Lim and Encik Zulkifli; and

(e) The Court of Appeal allowed D4's appeal against summary judgment ordered by the High Court because there was a conflict in affidavit evidence as to whether D4 was released as the plaintiff bank's guarantor and such a conflict could only be resolved at the trial of the plaintiff bank's suit against D4.

**[32]** The above material facts in *Noh Hyoung Seok* are clearly different from this case.

**Court's Decision**

**[33]** Based on the aforesaid reasons, I am not able to find:

(a) Any issue which justifies a trial of this suit. The defendant has failed to discharge its burden to raise a triable issue in this case; and

(b) Any circumstance in this case that ought to be investigated by this court. In other words, there is no "other reason for trial".

The upshot is I allow this application with costs.